IN THE

Supreme Court of the United States

October Term, 1975

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York, and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

against

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES, INC.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF AS *AMICI CURIAE* FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC. and ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS, INC.

HARRIET F. PILPEL
Attorney for Amici Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
GREENBAUM, WOLFF & ERNST
EVE W. PAUL
LAURIE R. ROCKETT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

State Statutes:

Books, Articles and Other Authorities:

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York, and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

against

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES, INC.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF AS *AMICI CURIAE* FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC. and ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS, INC.

Consent to Filing of Brief as *Amici Curiae*

Pursuant to Rule 42(2) of this Court, *amici* have obtained written consent from the attorneys for all parties to this case, to the filing of this brief as *amici curiae*.

Opinion Below

The opinion of the three-judge panel of the United States District Court for the Southern District of New York was rendered on July 2, 1975, and is reported at 398 F.Supp. 321.

Statement of Interest of *Amici*

Amici Planned Parenthood Federation of America, Inc. ("PPFA"), Planned Parenthood of New York City, Inc. ("PPNYC"), and the Association of Planned Parenthood Physicians, Inc. ("APPP") are vitally concerned with the issues raised by the instant case in relation to the ready availability of essential contraceptive health services to the public at large and especially to minors.

Planned Parenthood Federation of America, Inc.

PPFA is a not-for-profit corporation organized in 1922 under the laws of the State of New York and exempt from Federal taxation under §501(c)(3) of the Internal Revenue Code. Its headquarters are in New York City. It is the leading national voluntary public health organization in the field of family planning.

PPFA has 188 affiliates in 45 states and the District of Columbia, all of them separate not-for-profit entities. These affiliates operate approximately 725 family planning clinics offering services to the public. All but twelve affiliates offer medical services.

PPFA provides its affiliates with guidance in the areas of contraception, voluntary sterilization, infertility, abortion, sex education and education for marriage and parenthood. Each of the affiliates offering medical services functions under strict medical standards promulgated by the National Medical Committee in conjunction with local medical committees. These committees are made up of health professionals, the large majority of whom are physicians.

PPFA also functions as a clearing house for information and services relating to the areas referred to above. It formulates medical and clinical standards which are available to its affiliates and generally on a nationwide basis and develops guidelines and materials relating to public and professional education in all aspects of family planning. Its Medical Director and other experts confer with other national medical organizations, medical school faculties and local agencies in relation to teaching techniques, formation of clinics and the like.

Many of PPFA's affiliates operate in cooperation with local public health facilities. The affiliates are also teaching and training centers for physicians, nurses, teachers and social workers from this country and foreign countries and provide referral services for their clients to qualified medical specialists and facilities.

It is the policy of PPFA that contraceptive services should be made available to sexually active minors. PPFA has a long-standing concern with the problems of unwanted out-of-wedlock teenage pregnancies. This concern is shared by prominent authorities in the field of medicine who have recognized that sexually active minors face many serious

health hazards to themselves and their children if they are not given access to medically approved fertility control methods.* The health hazards demonstrated by numerous studies to follow from teenage pregnancies include greatly increased risk of infant mortality, prematurity, stillbirth and perinatal or brain injury to the child born. In terms of maternal mortality and morbidity, the teenage mother is a "high risk" medically in almost every respect during pregnancy and childbirth. The social problems which arise are obvious. Among them are increases in: out-of-wedlock pregnancies and births (40% of out-of-wedlock births are to teenagers); school dropouts; likelihood of poverty and dependency for both parents and child; and "forced" marriages between immature young people with little or no likelihood of providing a stable home environment for themselves or their children.

* In Appellants' Brief herein it is stated that "Surveys have shown that although many teenagers do not use contraceptives, in most instances this is not due to the fact that they are unavailable." In support of this statement, Appellants cite Sorensen, *Adolescent Sexuality in Contemporary America: Personal Values and Sexual Behavior* 18 (1973) and Schofield, *The Sexual Behavior of Young People* (1965). Yet the Sorensen Report points out (at p. 319) that 89% of the girls surveyed with current intercourse experience who did not always take pregnancy precautions when having intercourse during the preceding months agreed with the statement, "I don't know where to get birth control pills or any other kind of reliable contraceptive." And Sorensen in a study conducted seven years after publication of his 1965 book following up the original group interviewed and presenting the results of a new survey of teenagers cites the difficulty women have in obtaining contraceptives along with the unpremeditated nature of teenage sex as a reason for teenagers' failure to use contraceptives. Schofield, *Sexual Behavior of Young Adults* 212 (1975). He also finds that premarital sex is accepted by most teenagers and that 97% of young people believe birth control should be taught in the schools.

Planned Parenthood of New York City, Inc.

PPNYC is the major voluntary family planning agency in the City of New York. It is a non-profit corporation organized under the laws of the State of New York and is exempt from federal taxation under §501(c)(3) of the Internal Revenue Code. It operates five state-licensed family planning clinics directly serving between 45,000 and 50,000 patients annually by providing medically-approved and medically-prescribed birth control methods, and by providing other fertility-related services and low-cost pregnancy tests. The fees charged by PPNYC are on a sliding scale based on ability to pay; Medicaid patients are included among those served.

The clinics are staffed with qualified gynecologists, registered nurses, and other specially trained personnel. All women patients receive Pap smears under a cancer prevention and detection program carried out in cooperation with Memorial Hospital for Cancer and Allied Diseases.

In addition to its direct clinic services, PPNYC operates the Family Planning Information Service (FPIS). FPIS is New York City's central source of free information and referral on birth control, abortion, infertility problems and voluntary sterilization. It is currently handling close to 4,000 inquiries a month. PPNYC also produces informational literature for city-wide distribution.

PPNYC's case load has consistently included a substantial number of young people. In December of 1973, for example, 32 percent of PPNYC's new patients were nine-

teen years of age or younger. PPNYC has adopted a policy of rendering contraceptive services to minors in appropriate cases in accordance with the official policy of PPFA. On the basis of its experience in this field over a period of many years, as well as its knowledge of the practice of many practitioners, hospitals and public health agencies, PPNYC believes that contraceptive service has been and is being rendered to minors under sixteen by many physicians and licensed health facilities in this state, and that this practice is in accord with the law of New York.

In order to help prevent unwanted pregnancies among minors, PPNYC is presently engaged in a two-year program designed to make available to adolescents in New York City counseling information regarding birth control, sex education, and needed medical services on a completely confidential basis. The program, to cost $4 million, includes the following activities: a special city-wide telephone number exclusively for teenagers; "walk-in" assistance at all five of PPNYC's medical clinics; provision of information, counseling and medical referrals through several special offices in various New York City neighborhoods; expansion of medical services and counseling sessions now provided; acceleration and intensification of programs reaching adolescents through the New York City school system; making available condoms at cost at all PPNYC facilities in accordance with established medical directives; training of teachers and other professionals who work with adolescents; distribution of educational materials; utilization, on a public service basis, of mass media and mass transit advertising; and the provision of information and guidance to parents of adolescents.

Association of Planned Parenthood Physicians, Inc.

PPFA works closely with APPP, a New York not-for-profit corporation organized in 1974. APPP is the successor to the American Association of Planned Parenthood Physicians, an unincorporated association which was organized in 1963. In 1974, APPP had 922 members, all of whom were physicians or other health professionals associated with family planning.

APPP was formed for scientific, educational and charitable purposes and specifically to promote the ongoing interest in family planning in order to improve the stability and health of the family through responsible parenthood.

Amici believe that this brief submitted on their behalf brings additional material to the Court's attention as to the law in New York State related to contraceptive services to minors and as to relevant statistical data which may not be otherwise available to the Court and which will assist the Court in its consideration of this case. *Amici* will not address the issue of standing but fully concur with the points made in Appellees' Brief.

Statutory Provisions Involved

New York State Education Law §6811(8) (McKinney 1972)

"It shall be a class A misdemeanor for:

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of six-

teen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy is hereby prohibited; * * *''

Questions Presented

(1) Does New York's prohibition of the sale or distribution of non-prescription drugs to minors under sixteen violate the constitutional rights of such minors?

(2) Does the prohibition by a state of the sale or distribution of contraceptives except by licensed pharmacies or physicians violate its citizens' constitutional rights?

(3) Does the prohibition by a state of the advertisement and display of contraceptive products violate the First Amendment of the United States Constitution as incorporated in the Fourteenth Amendment and also otherwise violate the Fourteenth Amendment?

Summary of Argument

This Court has already recognized that access to contraceptives is part of the fundamental right to privacy guaranteed to citizens through the Fourteenth Amendment to the United States Constitution. And as the court below recognized, and this Court recently held, this right belongs to minors as well as to adults. The provisions of the New York statute which purport to prohibit the sale and distribution of non-prescription contraceptives by pharmacies to minors under sixteen effectively deprive many minors of the

ability to exercise this fundamental constitutional right. The State has shown no compelling state interest, or even a rational basis, for such infringement of minors' constitutional rights. In fact, the State itself conceded in the lower court that there is no evidence that the availability of contraceptives encourages promiscuity among minors. There is no basis either for the State's new argument in this Court that the official ''disapproval'' of sexual activity on the part of minors under sixteen allegedly implied in the statute will serve to deter the sexual activity of such minors. On the other hand, there is substantial statistical evidence establishing that limiting the access of such minors to contraception has serious physical, social and economic consequences both for the minors and for any infants which may be born to them.

The limitation on the sale and distribution of contraceptives to minors under sixteen also violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The New York Social Services Law requires that contraceptives must be made available to indigent minors regardless of age. There is no such mandate with reference to minors who are not indigent. Such a distinction, based on economic status, bears no relationship to the purposes allegedly underlying the statute and denies equal protection to non-indigent minors.

The provisions of the New York statute which prohibit the sale of contraceptives except by a licensed pharmacy likewise violate rights guaranteed by the Fourteenth Amendment. The State's argument that limiting access in this way is necessary to support the other provisions of the statute must fall with the provisions they are supposed to support. Moreover, the restriction is overbroad in that

it limits the access of all citizens, not only minors, to contraceptive products. Nor does the limitation on sales to pharmacies serve the alleged purposes of: preventing minors from selling contraceptives; preventing tampering with contraceptive products; or providing the benefit of the alleged expertise of pharmacists to consumers. Minors do work in pharmacies and sell non-prescription products. A much more narrowly drawn statute could regulate tampering. Citizens wishing to utilize the expertise of a pharmacy can do so whether or not the sale of contraceptives is limited to pharmacies and, in any event, the State has offered no support for its assumption that licensed pharmacists have any particular expertise in the area of contraception.

The statute's prohibition of the advertisement of contraceptive products violates the appellees' First Amendment rights as guaranteed by the Fourteenth Amendment. As this Court recently made clear, such advertisement is speech protected by the First, through the Fourteenth, Amendment. The State may not suppress dissemination of such commercial speech of clear public interest on the ground that it may be offensive to some members of its citizenry. Such a prohibition constitutes the kind of censorship which this Court has consistently held unconstitutional in its decisions in the areas of obscenity, of political speech and more recently of commercial speech.

ARGUMENT

POINT I

The New York statute's ban on the sale or distribution of non-prescription contraceptives to minors under sixteen violates the fundamental constitutional rights of such minors.

A. The State has no compelling interest which would overcome the minors' constitutional right of privacy.

In line with the subsequent July 1, 1976 decision of this Court in *Planned Parenthood of Central Missouri* v. *Danforth* (96 Sup. Ct. 2831), the District Court in its decision herein held the right of privacy recognized by the Court in *Roe* v. *Wade* (410 U.S. 113 (1973)), and *Doe* v. *Bolton* (410 U.S. 179 (1973)) applicable to minors as well as to adults. Specifically, the District Court held that the privacy right at issue here, access to contraceptives, is "an aspect of the right of privacy, that is, a right encompassed within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment" and applies to minors under sixteen. 398 F. Supp. at 331.

The District Court further found that the provisions of the New York statute prohibiting the sale or distribution of contraceptives to minors under sixteen are unconstitutional under the test set forth in *Boraas* v. *Village of Belle Terre* (476 F.2d 806, 814-15 (2d Cir. 1973), *rev'd on other grounds,* 416 U.S. 1 (1974)) in that its provisions are not sufficiently related to a legitimate state interest to justify the infringement of minors' constitutional rights. Because it found the New York statute unconstitutional even under this less stringent test, the Court did not find it necessary to

reach the question of whether the right of access to contraceptives is a fundamental one which may be infringed only when there is a compelling state interest in the subject matter of the statute. For the reasons set forth herein, *amici* contend not only that the Court below was correct in holding the New York statute unconstitutional under the *Boraas* test, but also that the right of minors to have access to contraceptives is a fundamental one which may not be infringed in the absence of a compelling state interest.

This Court has already indicated that it considers access to contraceptives to be a "fundamental human right." *Eisenstadt* v. *Baird* (405 U.S. 438 (1972)). And clearly the right to use contraceptives as recognized in *Griswold* v. *Connecticut* (381 U.S. 479 (1965)) would be meaningless if the State could effectively prevent use by restricting distribution. The State seeks to avoid the reasoning of the *Eisenstadt* decision by arguing that the statute does not prevent teenagers under sixteen from obtaining contraceptives; it merely requires that they see a doctor prior to obtaining them. As a practical matter, however, this requirement will in fact prevent many teenagers from obtaining contraceptives. There are still many doctors who hesitate to serve teenagers without parental consent because of an unfounded fear of recoveries against them in civil damage suits, even though parental consent is, as appellants point out, not required under New York law for distribution of contraceptives by physicians to minors. Moreover, many teenagers do not have money enough to see a doctor or may be embarrassed to discuss contraceptives with a doctor or believe the doctor will inform their parents. Finally, the embarrassment of being

refused contraceptives on the basis of their age may discourage teenagers under, and even some over, sixteen from attempting to purchase them. While it might actually be preferable to have every sexually active teenager consult with a physician regarding contraceptives, the sad reality is that unless contraceptives are available over the counter, thousands of young people will simply not get them, will engage in unprotected sexual activity and will be exposed to the risk of unwanted pregnancies, venereal disease and untold medical and social costs. The provisions of the statute thus will infringe on this fundamental right of many teenagers. To justify such infringement the State must be able to show more than that the statute in question bears some rational relationship to legitimate state purposes (Brief for Appellants, at p. 14). The State has failed to show even a rational relationship, much less a compelling state interest.

Having admitted below that "there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives . . .", the State now attempts to argue that even though the availability of contraceptives does not increase sexual activity, teenagers will view the lack of a prohibition on sales to minors as a sanction by the State to engage in sexual intercourse and will thereby be encouraged to do so. (Brief for Appellants, at 17). This academic twist to the familiar and discredited position regarding availability is supported neither by logic nor by the facts.

New York is the only state in the union which has a statute prohibiting the sale of nonprescription contracep-

tives to minors,* yet figures relating to out-of-wedlock births and abortion indicate that the incidence of teenage extramarital sex in New York is actually higher than in the nation as a whole. From 1971 to 1974 while the ban on sale and distribution to those under sixteen was in effect, for example, pregnancies among minors in New York increased by 25½%. In 1974 alone, the incidence of pregnancy among New York State girls increased by 29% for thirteen-year-olds, 42% for fourteen-year-olds and 30% for fifteen-year-olds (N.Y. State Coalition for Family Planning). Clearly the statute has in fact had no deterrent effect on sexually active teenagers under sixteen.

Nor is this surprising. Studies relating to the impact of legislation on teenage sex shows that teenagers are generally not even aware of such laws. As one report concluded:

> "Young people do not deliberately violate the law in matters of sex; they simply consider laws about sex irrelevant to their personal behavior." Sorensen, *supra*, at 93.

The Sorensen Report further found that the primary reason teenagers do not engage in sexual intercourse is not because of lack of availability of contraceptives or of parental or social sanction, but rather because they are not ready for it or have not yet met the right person (*Id.* at 13-19, 194).

In addition to studies which directly refute the State's contention that permitting the sale of contraceptives to

* *Family Planning, Contraception and Voluntary Sterilization: An Analysis of Laws and Policies in the United States, Each State and Jurisdiction*, A Report of the National Center for Family Planning Services 76 (DHEW Pub. No. (HSA) 74-16001, 1974).

teenagers will encourage teenage sexual activity, there is impressive documentation of the fact, which the State itself admits, that most sexually active teenagers do not use contraceptives until after they have been sexually active for a period of time (Brief for Appellants, at 18).* The vast majority of teenagers who do use contraceptives are thus no longer susceptible to the deterrent value, if any, of learning that the state legislature "disapproves" of their activities.

The State's argument is also refuted by its own admission that availability of contraceptives does not increase the incidence of teenage sex. For availability clearly implies State sanction either through lack of regulation or failure by the State to enforce the existing law.

Finally, any disapproval implicit in the statute is counteracted by the existence of Sections 350.1(e) and 365-a.3 (c) (as amended 1974) of the New York Social Services Law which provide for distribution of contraceptives to eligible "persons of childbearing age including children under twenty-one years of age who can be considered sexually active." Although the State contends in its Brief (*see* footnote, at 15) that these sections mean that contraceptive products must be made available *through physicians* if the person is less than sixteen years of age, there is no reference in either section to such a requirement, the only criteria for such service being sexual activity and the wishes of the child. Nor does the Administrative Letter (73 PWD-186) issued

* The State suggests that the fact that many teenagers would not purchase contraceptives, even if available, minimizes the impact of the statute. That all do not take advantage of their rights is, however, no reason to deny those who wish to do so the opportunity and to force them to take the risk of unwanted pregnancy.

by the New York State Department of Social Services pursuant to Section 350.1(e) refer to the necessity of dispensing contraceptives through a physician. The directive simply states that:

> "each social service district shall offer, and provide promptly upon request, in accordance with this Section, family planning services to the following groups *including minors who can be considered sexually active*: income maintenance recipients; medically needy only recipients of childbearing age; and Supplementary Security Income claimants of childbearing age." [emphasis supplied].

Further the Administrative Letter provides that:

> "each foster family parent providing care for an adolescent (12 years of age and up) shall be advised in writing of the availability for each adolescent of family planning services, within 30 days after assuming care of such adolescent . . ."

Another state program which mandates that contraceptives be supplied to persons under sixteen is the program of Medical Assistance for Needy Persons (Medicaid), established under Article 5, Title 11 of the Social Services Law. Section 363-a of that law provides that a plan for implementing such assistance must conform with requirements of Title XIX of the Federal Social Security Act (42 U.S. C. Section 1396 *et seq.*). Each public welfare district is required to furnish medical assistance to the persons eligible therefor who reside in its territory. Social Services Law Section 365.

"Medical assistance" is defined by statute to include "family planning services and supplies for eligible persons

of child-bearing age including children under twenty-one years of age who can be considered sexually active, who desire such services and supplies, in accordance with the requirements of federal law and the regulations of the department." Social Services Law Section 365-a.3(c) (as amended 1974).

This Section, like Section 350.1(e) of the Social Services Law makes no mention of any requirement that such services and supplies be dispensed by a physician.

In contrast to the substantial documentation which refutes any notion that such a meaningless state sanction as the statute here involved will discourage teenage sex, the State offers in support of its argument a single quotation contained in an article on another subject. On the basis of this statement it asserts there is a legitimate state interest in a law purporting to limit the access of contraceptives to sexually active teenagers under sixteen.

This hypothetical benefit of the statute must be balanced against the very real and documented hazards which are being incurred as a result of the restriction it imposes on minors' access to contraceptives. The statistics on sexual activity among teenagers under the age of sixteen are impressive. In 1974 through 1975, 24% of all fifteen-year-old girls, 17% of all fourteen-year-olds and 10% of all thirteen-year-olds were sexually active. The Alan Guttmacher Institute, *Eleven Million Teenagers: Teenage Sexuality, Pregnancy and Childbirth, The Problem, The Consequences, The Programs.* (To be published in the fall of 1976).

In a period of otherwise declining birth rates, out-of-wedlock births in the United States for teenagers have continued to increase, and the increase has been especially significant for younger teenagers, rising 75% from 1961 to 1974 in the fourteen to seventeen-year-old age group. *Id.* at I.8. See also, *National Center for Health Statistics, DHEW* (NCHS), *Interval Between First Marriage and Legitimate First Birth, United States, 1964-66,* 18 MONTHLY VITAL STATISTICS REPORT, No. 12 (Supp. 1970); NCHS, *Summary Report, Final Natality Statistics,* 1969, 22 MONTHLY VITAL STATISTICS REPORT, No. 7 (Supp. 1973); and P. Cutright, "Illegitimacy in the United States", 1920-1968, in Commission on Population Growth and the American Future, *Demographic and Social Aspects of Population Growth,* C. F. Westoff and R. Parke, Jr. (Eds.), Vol. 1 of Commission Research Reports, 1972, at 375.

These statistics represent disastrous consequences for many teenage girls and for their infants. The medical risks associated with pregnancy are significantly higher for women under twenty and increase dramatically with decreasing age. The maternal death rate from complications of pregnancy, birth and delivery for teenagers under the age of fifteen is 1.6 times that of women in their early twenties. Moreover, teenagers under the age of fifteen are 3½ times as likely to die as a result of toxemia associated with pregnancy. Alan Guttmacher Institute, *supra,* at II.16. Infant mortality and medical risks are also considerably higher for babies born to teenagers in the younger age groups. For first babies, the infant mortality rate during the first year is 3.3 times higher for babies born to teenagers under fifteen than to women in their early twenties. The mortality

rate during the first year for all babies born to women ten to fourteen years of age is 2½ times the mortality rate for infants of women over twenty. Low birth weight, a major cause of childhood illness and birth injuries including neurological defects, as well as of infant mortality, is also more common in infants born to young teenagers than to women in their early twenties. For teenagers under fifteen the incidence of low birth weight is 2½ times greater. *Id.* at II.15, II.16. *See also,* J. A. Menken, "Teenage Childbearing: Its Medical Aspects and Implications for the United States Population", in Commission on Population Growth and the American Future, *Demographic and Social Aspects of Population Growth,* C. F. Westoff and R. Parke, Jr. (eds.), *supra,* at 331. *See* Day, *Factors Influencing Offspring,* 113 AM. J. DISEASES OF CHILDREN 179 (1967); Daniels, *Medical, Legal and Social Indications of Contraceptives for Teenagers,* 50 CHILD WELFARE 150 (1971); Wallace, *Teenage Pregnancy,* AM. J. OBST. & GYNEC. (Aug. 15, 1965); Grant, *Biologic Outcomes of Adolescent Pregnancy: An Administrative Perspective,* in Johns Hopkins Univ. School of Hygiene and Public Health, PERSPECTIVES IN MATERNAL AND CHILD HEALTH (1970).

The social consequences of unwanted pregnancy for a teenage girl can be equally disastrous. As the Court pointed out in *Poe* v. *Gerstein* (517 F.2d 785, 791 (5th Cir. 1975)):

> "Teenage motherhood involves serious consequences, adverse physical and psychological effects upon the minor and her children, the stigma of unwed motherhood, impairment of educational opportunities caused by the need to drop out of school and numerous other social dislocations."

In addition to the emotional impact of an unwanted pregnancy, statistics indicate that the rate of school drop-out and unemployment is significantly higher among women who give birth in their teens. Alan Guttmacher Institute, *supra,* at II.18, II.19 and II.20. There are social consequences for the child as well, who has a greater chance of being physically abused or neglected if it survives. Gil, *Violence Against Children—Physical Child Abuse in the United States* 109 (Harvard University Press 1970) (9.29 percent of abusing mothers in 1957 were younger than twenty years of age); U.S. Bureau of the Census, Current Population Reports, Previous and Prospective Fertility: 1967, 29, Series P-20, No. 211 (only 2.4% of mothers fourteen to forty-four were younger than twenty).

In the light of these serious consequences, an attempt to discourage promiscuity by prohibiting the sale of contraceptives on the unsupported theory that the state disapproval therein implied will discourage sexual activity can only prove illusory and harmful.

B. The prohibition denies minors under sixteen the equal protection of the laws guaranteed by the Fourteenth Amendment.

Since the Legislature has authorized contraceptive services for needy teenagers under the age of sixteen under Sections 350.1(e) and 365-a.3(e) of the Social Services Law without the intervention of a physician, New York law permits economically disadvantaged teenagers to exercise their constitutionally protected right to have access to birth control, but denies the exercise of that same constitutionally protected right to more affluent young people.

Such an arbitrary classification cannot withstand attack under the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause denies to states "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Eisenstadt* v. *Baird, supra,* at 446. A classification "must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed,* 404 U.S. 71, 76 (1971), *quoting, Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).

In *Eisenstadt* v. *Baird, supra,* this Court invalidated a Massachusetts law which forbade the distribution of contraceptives to unmarried persons on the ground that the Equal Protection Clause precludes a classification based on marriage which bears no rational relationship to the object of the statute. Appellees rely on this case in support of their argument that any statutory classification based solely on age with regard to the distribution of contraceptives is a denial of equal protection. *Amici* agree. But we make the additional argument that a distinction between indigent young people and affluent young ones would similarly be barred by the Equal Protection Clause.

In *Griswold* v. *Connecticut* (381 U.S. 479 (1965)), this Court invalidated a Connecticut statute forbidding the use of contraceptive drugs or devices. In his concurring opinion, Mr. Justice White said:

> "[T]he clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those with-

> out either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment." *Id.* at 503 [citations omitted].

Mr. Justice White's reasoning presents the converse of the situation now before this Court. Under the New York law, as construed by the plaintiffs, the right to obtain contraceptive supplies is withheld from affluent young people for reasons of economic status. There can be no rational connection between their (or their parents') economic status and the availability of contraceptives to them. While the State can certainly render services to welfare recipients which it does not render to others, it cannot constitutionally withhold from the others access to the identical services for which they can afford to pay. The right of access to effective contraceptives should not and cannot be a function of affluence or poverty.

POINT II

The New York statute's prohibition on the sale or distribution of contraceptives except by licensed pharmacies or physicians violates the constitutional rights of New York citizens as guaranteed by the Fourteenth Amendment.

As was pointed out by the Court below, the limitation of the sale or distribution of non-prescription contraceptives to licensed pharmacists clearly restricts access to these products. 398 F.Supp. at 334. In support of this restriction the State suggests three rationales: (1) the restriction

will assure that only persons of mature years will be involved in the sale of such products; (2) the restriction will permit purchasers to inquire as to the relative qualities of the varying products and will prevent anyone from tampering with them; and (3) the restriction will enable the State to police that part of Section 6811(8) which forbids display of contraceptive products in licensed pharmacies and sales to minors under sixteen. As set forth in Point I, *supra,* and Point III, *infra,* the State may not constitutionally so restrict sales to minors under sixteen or forbid advertising and display of contraceptive products. Any rationale resting on these provisions of the statute must therefore fail. Moreover, even if the State could justify these restrictions, the provisions seeking to enforce them by limiting sales to licensed pharmacies would be overbroad in that they restrict the access of all citizens, not just minors under sixteen, to contraceptive products. The State contends that this is necessary to facilitate the enforcement of these restrictions. However, as the Court below correctly pointed out, increased administrative inconvenience or burden is no justification for infringing constitutional rights. 398 F.Supp. at 335.

Nor can these restrictions be justified on the other two grounds suggested by the State. With respect to the argument that young people will not be forced to sell contraceptives, if this indeed is a reason for the enactment of the restriction on sale to pharmacies, it fails of its purpose. New York law does not restrict the employment of minors in pharmacies; it merely requires that a licensed pharmacist prepare prescription drugs. In many cases, young people are in fact employed in pharmacies to sell the many

non-prescription items, including contraceptives which are sold there. If it was the intention of the Legislature to require that persons selling contraceptive products have attained a certain age, it could have enacted a statute to this effect. The present provision not only fails to achieve this result, but is overbroad in that it prevents anyone, regardless of age, who is not employed by a licensed pharmacy, from selling such products and does not prevent minors employed in licensed pharmacies from selling them.

Finally, as this Court has already made clear in *Eisenstadt* v. *Baird, supra,* imposing such a restriction in order to permit purchasers to inquire as to the relative qualities of varying products and to prevent anyone from tampering with them, is "both discriminatory and overbroad." In that case, the State of Massachusetts attempted to support a similar restriction on the ground that the purpose of the amendment was to "serve the health needs of the community by regulating distribution of potentially harmful articles." Noting that not all contraceptives are potentially dangerous and that there are many state and federal laws already in existence regulating the sale and distribution of harmful drugs, the Court there held that the health rationale was inadequate to support the infringement on the right of the citizens of Massachusetts to have access to contraceptives. 405 U.S. at 450.

If the State cannot constitutionally restrict access to contraceptive products on the ground that such a restriction is necessary to protect the health of its citizens, it surely cannot impose such a restriction in order to permit consumers to inquire as to the relative quality of the varying products and to prevent anyone from tampering with them. As the District Court pointed out, the State has offered no evidence to suggest that pharmacists may have unique training or qualifications with regard to giving advice about contraception. And as Chief Justice Burger pointed out in his concurring opinion in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, —— U.S. ——, 48 L.Ed.2d 346, 365 (1976), even in dealing with prescription drugs:

> "Roughly 95% of all prescriptions are filled with dosage units already prepared by the manufacturer and sold to the pharmacy in that form. . . . In dispensing these items, the pharmacist performs three tasks: he finds the correct bottle; he counts out the correct number of tablets or measures the right amount of liquid; and he accurately transfers the doctor's dosage instructions to the container. Without minimizing the potential consequences of error in performing these tasks or the importance of the other tasks a professional pharmacist performs, it is clear that in this regard he no more renders a true professional service than a clerk who sells lawbooks."

With respect to non-prescription contraceptives, the role of the pharmacist is even less; his sole function is to hand the customer the correct item and collect the price. And this task may be performed either by a pharmacist or by any of the sales clerks working for him. Anyone seeking advice, assuming that a pharmacist would be qualified to give it, regarding the relative merits of the contraceptive would have to seek out the pharmacist. And this is true whether sales are restricted to pharmacies or whether such products are available in other retail outlets as well. More-

over, as the District Court noted, in exempting proprietary medicines, such as aspirin, cough syrups, decongestants and the like from the requirement that sales be limited to pharmacies the Legislature has recognized that there is no necessity for such restriction with respect to prepackaged, non-prescription items. N.Y. Education Law, Section 6807(c). Certainly there is no basis for distinguishing these items from non-prescription contraceptives in terms of the value of having a pharmacist available to answer questions which the consumer might have.

The suggestion that the restriction on sales to licensed pharmacies is necessary to prevent tampering with the contraceptive is subject to similar objections. The State has not distinguished between devices which might be injured by tampering and those which would not. If fear of tampering were the object of the statute, the State could enact laws directly related to those specific problems which may arise with respect to certain products, or regulate the handling of such products. As was pointed out by the Court below, while there may be valid regulations which the State could enact in this area, the blanket prohibition on sale of such products by outlets other than licensed pharmacies is overbroad, unconstitutional in and of itself, and insufficient to overcome the constitutional infirmities of the statute.

POINT III

The New York statute's prohibition of advertisement or display of contraceptives violates the appellees' First Amendment rights as guaranteed by the Fourteenth Amendment.

In its May 24, 1976 decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra,* the Supreme Court squarely held that a statute prohibiting the advertisement of a consumer product, in that case a prescription drug, violated the constitutional rights both of advertisers and of consumers of the product under the First and Fourteenth Amendments to the U.S. Constitution. Both the holding and reasoning of that case are directly applicable to the provision of that part of Section 6811(8) of the New York Education Law which prohibits, without exception, the advertisement or display of contraceptive products.

The Court held in the Virginia case that speech which "does no more than propose a commercial transaction" is protected by the First Amendment, on the ground that

> "Society . . . may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely 'commercial' may be of general public interest." 48 L.Ed. 2d at 360.

Clearly, society does have a strong interest in the availability, relative merits and prices of contraceptive products.

The State seeks to justify the provisions of Section 6811(1) relating to advertising and display on the ground that:

> "Section 6811(8) limits only commercial advertisement of contraceptive products and is not overbroad." (Brief for Appellants, at 23)

Without conceding that the statute is limited as the State argues, *Virginia State Board of Pharmacy, supra,* disposes of the argument that a purely commercial advertisement lacks First Amendment protection.

Moreover, Section 6102(19) of the New York Education Law defines "advertisement" broadly to include

> "*all representations* disseminated in *any manner or by any means,* other than labeling, for the purpose of inducing or which are likely to induce, *directly or indirectly,* the purchase of drugs, devices or cosmetics" [Emphasis supplied].

Even were commercial speech not entitled to the protection of the First Amendment, the ban on advertising contained in Section 6811(8) would run afoul of the First and Fourteenth Amendments. This language is broad enough to encompass educational material urging the use of contraceptives, material clearly of public interest and of a non-commercial nature. Such material even if contained in an advertisement is in any event protected by the First Amendment. *Bigelow* v. *Commonwealth of Virginia,* 421 U.S. 809 (1975); *New York Times* v. *Sullivan,* 376 U.S. 254 (1964).

The State contends, however, that the statute is reasonable because it reflects "a legitimate legislative concern

that individuals not be exposed to displays and advertisements which may be offensive and embarrassing to many . . . [and that displays and advertisement of contraceptive products] will lead to legitimization of sexual activity on the part of young children of New York State and increased promiscuity." (Brief for Appellants, at 24.) Assuming that these are in fact legitimate concerns, neither is sufficiently compelling to overcome the First Amendment protection afforded to advertisements which are themselves constitutionally protected and which in addition relate to a constitutionally protected right. Moreover, the statute is overbroad in that it affects all advertisements of contraceptives regardless of content or method or extent of dissemination. The State is in effect arguing that protecting the sensibilities of a few individuals, who may be offended by the mere mention of the subject of contraceptives, justifies a complete suppression of communication of material of general public interest. The long line of decisions of this Court in the area of obscenity makes clear that this is not the case. And much speech of a political nature or of social interest which is clearly protected by the First Amendment may be extremely embarrassing or offensive to some people. That possibility has never justified censorship of the kind contained in Section 6811(8).

As this Court observed in *Virginia State Board of Pharmacy, supra*:

> "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude

that the answer to this one is in the negative." 48 L. Ed. 2d at 365.

Nor can the prohibition be justified on the ground that it will prevent promiscuity. If access to contraceptives has no effect on promiscuity (see POINT I, *supra*), it is difficult to understand how exposure to advertising could have such an effect. And, in any event, the prohibition of advertising goes beyond prohibition of advertising to teenagers, it extends to all advertising regardless of content, context, taste or method or extent of dissemination. This is not a "mere time, place and manner restriction" (*Virginia State Board of Pharmacy,* 48 L.Ed. 2d at 363); it is an absolute prohibition on communication of speech protected by the First Amendment which the State attempts to justify on the ground that such communication may be harmful to certain elements of the population. The State has thus chosen to let the possibility of harm to a few (which it has in no way established) override the legitimate interest of the majority of its citizens in receiving such information. But, as this Court pointed out in *Bigelow,* this choice is not the State's to make. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 363.

As in the case of the restriction on sale and distribution to minors under sixteen, the State, without adducing any data to this effect, attempts to justify its infringement of First Amendment rights on the ground that the prohibition on advertising and display will discourage promiscuity.

Again, the entirely hypothetical benefit to be gained cannot and does not justify the infringement of a fundamental constitutional right.

Conclusion

For the reasons stated in this brief and in the brief of the Appellees, *amici* respectfully urge that this Court affirm the judgment of the three-judge court below.

October 1, 1976

Respectfully submitted,

HARRIET F. PILPEL
Attorney for Amici Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
GREENBAUM, WOLFF & ERNST
EVE W. PAUL
LAURIE R. ROCKETT

amicus brief